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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 834

WILBUR E. DOW,

*Petitioner,*

*vs.*

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HENRY L. STIMSON, SECRETARY OF WAR.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.**

WILBUR E. DOW, JR.,
WILLIAM G. SYMMERS,
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 834

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WILBUR E. DOW,

*Petitioner,*

*against*

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HENRY L. STIMSON, SECRETARY OF WAR.

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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*To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petitioner, Wilbur E. Dow, prays that a writ of certiorari be issued to review a final decree of the United States Court of Appeals for the District of Columbia entered on August 4th, 1941, affirming the orders of dismissal of the District Court of the United States for the District of Columbia and granting the motions of the respondents for dismissal of petitioner's action at law.*

* The time within which to file petition for certiorari was extended to and including January 3rd, 1942 (R. 56).

## Jurisdiction.

The final decree of the United States Court of Appeals for the District of Columbia was entered on August 4th, 1941. The jurisdiction of this Court is invoked under Section 240, Judicial Code (28 U. S. Code Sec. 347(a)).

## Statutes and Rules Involved.

1. Section 1 of the Act of Congress, June 6, 1924, 42 Stat. 464, as amended June 18, 1926, 44 Stat. 752, reading as follows:

> Section 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska, the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved, the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein, it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribed under the authority herein given: *Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen*

*of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.* The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress; Provided, further, that the Secretary of Commerce is hereby authorized to permit the taking of fish or shellfish, for bait purposes only, at any or all seasons in any or all Alaskan Territorial waters. (Italics ours.)

2. Rules and Regulations published according to the Federal Register Act, Sec. 7, (July 26, 1935, 49 Stat. 500, 502) appearing in 4 Fed. Reg. 908 (D. I.) and the amendments effective February 24, 1940, as appearing in 5 Fed. Reg. 747 (D. I.).

3. Sherman Anti-Trust Act, 26 Stat. 209, c. 647.

**Opinions Below.**

The opinion of the United States Court of Appeals for the District of Columbia written by Judge Rutledge and concurred in by Judges Groner and Edgerton, was decided August 4, 1941, and is reported in — F. (2d) —, 1942. Docket No. 7911.

**Questions Presented.**

1. Has the Court the power of review to determine if the Secretary of the Interior has exceeded the standards of discretion as laid down in the Act of Congress entitled, "An Act for the Protection of the Fisheries of Alaska and for Other Purposes"?

2. Has the Congress by that Statute reserved to all citizens, including petitioner, an equal right to fish by the

same method and under similar conditions as granted to any other citizen or corporation?

3. Is the denial of the right of the petitioner to fish by the same method and under the same conditions as those presently enjoying this right to the exclusion of all others

(a) an abuse of discretion on the part of the respondents under the terms of the Statute;

(b) exercise of authority in excess of the standards set up within the Statute;

(c) the maintenance of an unlawful monopoly?

**Summary and Statement of Matter Involved.**

In November 1939, the petitioner applied to the Bureau of Fisheries of the Department of the Interior, as required by the Secretary, for the allocation by that Bureau of two sites wherein he might erect structures called fish traps for the capture of salmon in the coastal waters of Alaska. Prior to that date, the petitioner had duly applied for and received his Territorial license from the Treasurer of the Territory of Alaska and duly made application to the War Department for a permit for the construction of such traps under the rules of that Department to prevent the erection of any obstructions to navigation.

On January 6, 1940, the respondent, Harold L. Ickes, Secretary of the Interior, announced the issuance of the Alaska Fishing Regulations of the Bureau of Fisheries for the season of 1940, in which the sites requested by the petitioner were not included, although approximately 500 trap sites were listed therein. As the War Department, under an agreement with the Department of the Interior, issues only one permit for the erection of a trap on each site, petitioner was precluded from enjoying his right of fishery under the statute.

An action at law was brought in the United States District Court for the District of Columbia with a broad prayer for relief requesting the equal right to fish in common with those applications for trap sites which had been granted. The Secretary of War was included in the action, as by his failure to issue more than one permit for the erection of a trap on each site and that permit only to the party who first requested the site to be opened by the Secretary of the Interior, he effectually prevented any use of that site for the erection of a fish trap by any one other than the original applicant; your petitioner therefore had no alternative but to prospect for sites of his own and then apply for their opening in the usual way. Thereafter, both respondents moved to dismiss, which motions were granted in the District Court and affirmed by the United States Court of Appeals for the District of Columbia.

The petitioner has maintained and still maintains that:

(a) At no time are sites for the erection of traps ever included in the Alaska fishing Regulations of the Department of the Interior except at the specific request of some person or corporation, there being no general open area for the erection of fish traps in any area of Alaska, and each site so included in the Regulations is of such size as to permit the erection of only a single trap on each site.

(b) With the exception of only three traps that are privately owned, all traps in the Aleutian Peninsula area and the Western part of Alaska are owned by three large corporations. In Southeastern Alaska, which constitutes the only other area of Alaska open or suitable for trap fishing, over 60% of the traps are owned by four large companies and 80% of all traps in that area are owned or controlled by nine companies.

(c) That the three corporations who own all but three out of approximately 200 traps in the Western area of Alaska are the corporate descendants or successors in interest to the four corporations amongst which the Western area of Alaska was divided up by President Hoover in 1924 in order to better "control" the fishing in that area.

(d) The complaints which arose by reason of such arbitrary division of fishing grounds as described above, resulted in the Act of Congress herein involved and set forth on Page 3 of this petition.

(e) That this statute prescribed certain limits upon the Secretary's discretion and set up standards beyond which he might not go and that his arbitrary refusal to open the sites requested by petitioner, or designate any open area into which he might go to find one satisfactory to the Secretary, while opening sites requested by the large corporations year after year, is an abuse of discretion under the terms of the Statute.

(f) That the net result of the foregoing is the creation of an unlawful monopoly, the recurrence of which the Statute itself was specifically designed to prevent.

The petitioner in this action has for a greater part of his life been engaged in the Alaska fishing industry in the employ of other corporations and individuals, but when he sought to strike out for himself, erect his own traps and thus provide fish for his own cannery or one to be leased by him, he found that there was what amounted to an airtight monopoly under the protection of both the Department of the Interior and the War Department which prevented him or any new-comer from engaging in the fishing industry through the erection of fish traps in any part of Alaska. In January 1940, 20 trap sites were closed by the Department out of over 500 open the year

before, but all of those closed were either unproductive or sites upon which no regular fish trap had ever been erected. Although these sites were closed for what were said to be reasons of conservation, the regular fishing season was considerably lengthened to permit all fishermen and trap operators to make a still greater catch to supply the ever-increasing demand for food during the present emergency.

The Statute in question limits the Secretary's authority by providing: "That every such regulation made by the Secretary of Commerce (Interior) shall be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce (Interior)".

A fish trap is a pile structure built like one side of a wharf which extends out into the sea a distance of about 1,000 feet. Wire netting is stretched between the pilings to induce the fish to travel the length of the structure and devices built at the end thereof tend to keep the fish from leaving until this "heart" has been "brailed" out (scooped out with a net) by the trap tender.

A trap attacks general run fish which do not "school up". It is only the schooling fish which may be caught by a seine fisherman from boats, which is the only other commercial method of any importance of catching fish in Alaska. The maintenance of traps has a steadying influence on the entire industry as it supplies canneries with fish when the schooling fish followed by the same boats have gone to distant waters. They are found by prospecting much like gold and when built, often prove unprofitable, the fish for reasons of their own having taken a different route to their spawning grounds.

Experience has shown that the best method of trap control is an increase or decrease in the weekly closed period and this method has, to some extent, been followed by the Secretary of the Interior. It is by far the most equitable method as it can control the catch irrespective of the number of traps. There are many thousands of miles of Alaska coast line and the largest number of traps ever erected in Alaskan waters about 25 years ago when there were no restrictions was only a little over 700. An increase in the weekly closed period could lower the catch to any given point irrespective of the number of traps in existence. While this Court has not the power to tell the Secretary of the Interior just how he must exercise his discretion, it may certainly prevent an abuse of discretion when there are other more equitable ways of accomplishing the results sought by the Statute.

Petitioner does not seek trap sites prospected for, applied for and erected by others, even though under the terms of this Act, he has an equal right to fish there in common with the discoverer of the site and builder of the trap. Such a practice would lead to "trap jumping" and a form of legalized commercial warfare. Petitioner seeks, however, not the rights of others, but merely equal rights of his own. As long as fish traps are permitted in the waters of Alaska, that method of fishing should be open to all who desire to risk their money and effort to make it profitable.

The Secretary of the Interior should not be allowed to circumvent the prohibition against monopoly by the method of reducing the size of trap sites to the point where they will accommodate only one trap and then falling back on the phrase in the Statute, "where fishing is permitted by the Secretary of Commerce (Interior)".

Prior to 1927, all Alaska was open to fishing except cer-

tain specified areas as the mouths of streams, spawning beds, etc. In 1927, Regulations were, without hearings or prior notice of any kind, turned completely about and all Alaska was said to be closed to fishing except the certain specified areas which would accommodate only a single trap. This worked well as long as all applications were granted and the capture of fish controlled by the increase and decrease in the weekly closed period required of all traps. In 1938, however, the Secretary of the Interior discontinued this practice and "froze" all the sites, leaving those open which were in force, but declining to open any new ones. The result of this practice was to give those in prior possession of such traps a monopoly of the entire industry, which the Secretary erroneously or unknowingly insisted upon maintaining.

**Reasons for Granting Petition.**

The petition should be granted because the United States Court of Appeals for the District of Columbia has decided an important question of Federal law, namely, the equal right of all citizens of fishery in the waters of Alaska. This question has not been, but should be, settled by this Honorable Court.

The opinion of the court below is not based upon any prior decision, although some cases are cited therein in support of collateral issues, but the case is one for review by your Court when the Statute invoked, in so many words, reserves to any citizen the very right which the court denies.

The proper determination of this Federal question is of great importance to the citizens and natives of Alaska who, under the decision of the Court of Appeals, are denied the right to erect fish traps in the tidal waters in their own

front yards, although one of the large corporations which has a monopoly on the business may have a trap on each side of them.

WILBUR E. DOW,
By WILBUR E. DOW, JR.,
WILLIAM G. SYMMERS,
*Counsel for Petitioner.*

STATE OF NEW YORK,
*County of New York, ss:*

Wilbur E. Dow, Jr., being duly sworn, according to law, deposes and says that he is counsel for the petitioner herein and that the facts set forth in the foregoing Petition are true and correct to the best of his knowledge, information and belief.

WILBUR E. DOW, JR.

Sworn to and subscribed before me this 2nd day of January, 1942.

VIOLA C. OTTAVIANO,
[SEAL.] *Notary Public, Westchester County.*

New York County Clerk's No. 83.
Commission Expires March 30, 1943.

I hereby certify that I have examined the foregoing Petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

WILBUR E. DOW, JR.,
*Counsel for Petitioner.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 834

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WILBUR E. DOW,

*Petitioner,*

*vs.*

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HENRY L. STIMSON, SECRETARY OF WAR.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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For Opinions below, Jurisdiction, Statement of the Case, and Questions Presented see Pages 2 to 9 of the Petition.

I.

**Rules and Regulations Made by the Secretary of the Interior Controlling Alaska Fisheries Are Subject to Judicial Review to Test Their Validity.**

The Act of Congress in question delegated broad powers of supervision and control to the Secretary of the Interior for the regulation of Alaska fisheries with the clear re-

striction upon the exercise of such authority and discretion:

> "That no exclusive or several right of fishery shall be granted therein nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secertary of Commerce (Interior)". Page 5, supra.

As long as this standard is met, the Secretary has full discretion but he cannot exceed it. In *Payne* v. *Central Pacific Railway Co.*, 255 U. S. 228 (1921), the Supreme Court said that the Act therein

> "does not clothe the Secretary with any discretion to substitute his judgment for the will of Congress as manifested in the granting Act."

See also:

*Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296; 83 S. W. (2d) 935; 87 S. W. (2d) 1069;

*A. L. A. Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, (1935); 79 L. Ed. 1570; 55 Sup. Ct. 837;

*Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); 79 L. Ed. 446; 55 Sup. Ct. 241;

*Charles Uhden* v. *Greenough*, 181 Wash. 412, 43 Pa. (2d) 983;

*Roberts* v. *U. S.*, 176 U. S. 221, 231 (1900).

In delegating to the Secretary the power to make rules and regulations covering fisheries in the waters of Alaska in the interests of conservation, Congress has placed a positive limitation on that power, namely, that no citizen is to be denied his right to fish where fishing is permitted. To violate that standard is going beyond his powers and is an abuse of any discretion vested in him under the Act.

To argue, as respondent did, that an "area" of Alaska referred to in the Regulations as "Alaska Peninsula Area,

Bristol Bay Area, Prince William Sound Area, etc." for purposes of defending this action, can be said to mean only the area required for the erection of a single trap and, therefore, any site opened by the Bureau is open to all, is misleading. This hypothesis, however, fails in the light of the agreement between the Secretary of the Interior and the Secretary of War for the issuance by the latter of only one permit, and that to the party originally requesting the site to be opened. As War Department permits are renewable the site continues in possession and control of the party who obtained it.

II.

**Rules and Regulations Depriving Petitioner of His Statutory Right to Fish in the Waters of Alaska Is an Injury Entitling Him to His Remedy at Law.**

The petitioner, Wilbur E. Dow, had been engaged in the fishing business in the Pacific Northwest and Alaska for the greater part of his life. In 1938, he made arrangements for the leasing of an idle cannery and applied for the right to operate traps at nearby points he had previously prospected. At these points, he believed he had found sufficient fish to justify the erection of a trap. He applied to the Treasurer of the Territory of Alaska and received his Territorial License, paying $200.00 for this privilege, and made application to the War Department and the Bureau of Fisheries for similar permits. These were denied without explanation as were the applications of all other new applicants, both for that year and every year since, although all sites opened prior to that time were permitted to remain open with the exception of 20 sites out of over 500 on which regular traps were never erected or were so unproductive as not to warrant further fishing.

As fishing is the only business with which petitioner is adequately familiar, he has been required to seek work

in a Seattle shipyard, although ready, able and willing to operate traps and a cannery in common with those now engaged in that work. There has never been any contention by the respondents that petitioner is not a citizen of the class referred to in the Statute.

III.

**The Present Methods of Control Operate to Give Exclusive Privileges to a Few Individuals and Corporations to Fish by Trap in the Waters of Alaska to the Exclusion of All Other Citizens and Contrary to the Statute.**

Four large corporations own or control one hundred per cent of the fishing operations in Southwestern Alaska and in excess of 80 per cent of the operations in Southeastern Alaska; these two areas comprise approximately 90 per cent of the entire Alaska Fishing industry. Of the twenty sites closed, all were either dummies on which proper traps had never been erected or which had been abandoned due to unprofitable operation, or traps owned by small individuals and their combined catch was less than any one of the more successful traps operated by the large companies, and of no real consequence to the industry.

Under the present rules of the Department, any citizen wishing a fish trap site applies for same by stating the exact latitude and longitude in degrees, minutes and seconds of the point of land where he wishes to locate his trap. The time limit for applications is usually December 1st of the current year. The necessary prerequisite of such application is that the applicant shall have his Alaskan fishing license covering the identical sites requested of the Department of the Interior, which petitioner had. As a fish trap is such a structure as projects into navigable waters, it is also required before the trap can be built, that a permit be obtained from the War Department for a

structure at that point. It is customary for the applicant to apply for his War Department permit at the same time that he applies to the Bureau of Fisheries for the opening of the site, and in this fashion, if the site is opened, he becomes the first applicant before the War Department for such site and so maintains his priority. The result of this arrangement is that when the Department of the Interior opens a site for fishing, it does in effect open it for the individual or firm that made the application, although he is not specifically named in the announcement in the Regulations. The Department has never yet opened a site for fishing except at the request of some firm or individual. As War Department permits run for three years (now one year) and are renewable, this in effect permanently reserves to the successful applicant that particular site.

As a result of the above arrangement, these fish trap permits issued by the Secretary of War are sold and leased as interests in property, directly contrary to the statement on the face thereof, that such permits are not to be deemed an interest in property.

As a result of the circumstances set forth above, those already in possession of trap sites have been, and are permitted to be, the only possessors of trap sites in Alaskan waters. Thus, the status quo in Alaskan fisheries is maintained for the benefit of those to whom sites have been granted and to the great detriment of those to whom they have been denied, contrary to the express provisions of the law.

## IV.

## If the Rules and Regulations Established by the Secretary Do Not Operate Within the Standard as Established in the Statute, the Court Must Declare Them Null and Void.

As the Statute sets forth many ways in which the Secretary may control the catch of salmon without infringing

the rights of citizens as guaranteed by the Statute, the Secretary should have no trouble in establishing proper regulations under the terms of the Act. The intent of the Act and an excellent explanation of the standard set up therein is to be found in the discussion which took place in the House and the Senate at the time of its enactment. This was quoted quite fully in petitioner's brief submitted in the Court of Appeals for the District of Columbia. In the Congressional Record for the 68th Congress, First Session, on Page 5973, the following discussion took place:

> "Mr. Hadley: * * * What the bill does is to provide that every citizen, operating whatever class of gear he may or will, is invited into the fishing areas where fishing is permitted by the Secretary of Commerce.
>
> Mr. Sutherland: Will the gentleman yield?
>
> Mr. Hadley: Yes.
>
> Mr. Sutherland: Does the gentleman contend that any citizen can fish with a trap?
>
> Mr. Hadley: I am making a general statement.
>
> Mr. Sutherland: That statement is very general.
>
> Mr. Hadley: Any citizen who has the facilities and has the capital may do so, but the citizen who operates a seine must also have a considerable investment to do that".

Similar discussion was frequently repeated and it was exceedingly clear that the purpose of the bill was to make fishing by trap available to any American who had the capital, foresight and energy to build a trap and fish in common and under the same conditions with all others who were similarly inclined.

Part of the discussion in the Senate, reported in the Congressional Record for May 26, 1924, on Pages 59 and 20, was as follows:

"Mr. Dill: Mr. President, I should like to ask my colleague a question. As I understand, the situation in Alaska has been very unsatisfactory as it has been handled up to this time, and those who object to the conditions which have prevailed there charge them largely to the Secretary of Commerce, claiming that he has not treated them fairly. As I understand, the bill gives the Secretary of Commerce practically absolute power.

Mr. Robinson: May I interrupt the Senator?

Mr. Dill: I yield.

Mr. Robinson: The Secretary of Commerce sought to give exclusive right to fish in certain Alaskan waters, and out of his attempt to give exclusive rights to fish, thus depriving a large number of people the right to pursue their usual vocation, great complaint arose. *This bill, however, denies to the Secretary of Commerce any power to grant an exclusive right to fish and requires him to give everyone equal rights within the areas where fishing is permitted.*

Mr. Dill: That is what I wanted to have made clear —as to whether this is an enlargement of his power or whether it is a limitation of his power.

Mr. Jones of Washington: This bill removes the principal cause of complaint with reference to the exercise of power by the Secretary of Commerce, just as the Senator from Arkansas has stated. Within the two reservations (Counsel's Note—privileged areas) that were created by Executive order a year or two ago, the Secretary of Commerce has seen fit to make regulations under which outsiders might not go in order to fish. *In other words, those who are already located there, if he thought they took all the fish that should be taken, were given the full rights, and nobody else could go in there and take fish.*

Mr. King: They were given exclusive rights." (Italics ours.)

## Conclusion.

The petitioner in this action wants only an equal right to fish in common with all others enjoying a similar privilege. He wishes to compete on an equal basis with others engaged in the industry.

We submit, therefore, that the United States Court of Appeals for the District of Columbia erred in affirming the orders of dismissal of the District Court of the United States for the District of Columbia, and that petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

WILBUR E. DOW, JR.,
WILLIAM G. SYMMERS,
*Attorneys for Petitioner.*

New York, N. Y., January 2nd, 1942.

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# In the Supreme Court of the United States

OCTOBER TERM, 1941

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WILBUR E. DOW, PETITIONER

*v.*

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HENRY L. STIMSON, SECRETARY OF WAR

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA*

---

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

---

### OPINION BELOW

The district court rendered no opinion. The opinion of the Court of Appeals for the District of Columbia (R. 45–53) is reported in 123 F. (2d) 909.

### JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered August 4, 1941 (R. 54). By an order of this Court entered on October 28, 1941, the time within which to file a petition for a writ of certiorari was extended to,

and including, January 3, 1942 (R. 56). The petition was filed January 3, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether, after all the open trap fishing sites have been occupied, a complaint will lie to direct the Secretary of Interior to open additional sites which were closed for conservation purposes by regulations issued under the Act of June 6, 1924, on the ground that the regulations exclude the petitioner from his equal right to fish in waters where fishing is permitted.

## STATUTE INVOLVED

Section 1 of the Act of June 6, 1924, c. 272, 43 Stat. 464, as amended by Reorganization Plan No. II, Sec. 4e, effective July 1, 1939, 53 Stat. 1433 (48 U. S. C., Secs. 221, 222) provides:

> That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved

the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. * * * *Provided,* That every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior. * * *

## STATEMENT

The judgment sought to be reviewed (R. 54) affirmed orders (R. 42–43) dismissing for failure to state a claim for relief petitioner's complaint against respondents, the Secretary of the Interior and the Secretary of War. The material allegations may be summarized as follows:

Beginning in 1927, the Bureau of Fisheries closed all areas in Alaskan waters to fishing by trap. Since that time it has permitted applications to be made for the opening of specific trap sites. After applications are filed the Department from time to time issues regulations listing the

sites opened to fishing (R. 5–6, par. 18). In November 1939 petitioner applied to the Bureau of Fisheries for the "allocation" to him of two sites in Alaskan waters within the limits of which he might take salmon by trap (R. 2, par. 2, 3). On January 6, 1940, the Secretary of the Interior, by issuing regulations which did not list the sites applied for, denied the application (R. 3, par. 5).[1] However, numerous other trap sites opened prior to petitioner's application and held by others than petitioner were allowed to remain open (R. 3, par. 8), but petitioner did not desire to occupy any of those sites for they were taken by others (R. 6, par. 21, 22). Petitioner also applied to the Secretary of War for a permit to erect salmon traps on the two chosen sites but the Secretary of War denied the permit (R. 2–3, 4).[2]

The complaint prayed that the Secretary of the Interior be enjoined from enforcing the regulations issued by him and be compelled to adopt one of three courses: (1) To open to salmon trapping the two sites desired by petitioner, (2) to open to such trapping enough of the coast line so that

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[1] These regulations, which were filed February 23, 1940 (5 Fed. Reg. pp. 747–754), amended regulations filed February 13, 1939 (4 Fed. Reg. pp. 908–938).

[2] Section 10 of the Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, 33 U. S. C. sec. 403, prohibits the erection of structures in the waters of the United States except on plans recommended by the Chief of Engineers and authorized by the Secretary of War.

petitioner might select a suitable site, or (3) to revert to the type of regulations in effect before 1927 whereby all the waters of Alaska, with exceptions not here material, were open to salmon trapping (R. 8). The complaint further prayed that the Secretary of War be enjoined from continuing his practice of issuing only one permit to a trap site (R. 8).

The district court dismissed the complaint on the defendants' motions (R. 42–43). The court of appeals affirmed the order of dismissal (R. 54). It held that the prayers for affirmative relief were not within the power of the court to grant because they involved matters within the discretion of the Secretary of the Interior (R. 48–50). The court of appeals also held that the regulations were not invalid merely because the limitation of the number of sites and the physical conditions requiring that each site have but one occupant, ~~together~~ resulted in depriving petitioner of the opportunity to engage in trap fishing. Since petitioner did not seek to fish in the opened waters, the court held that it did not need to consider and did not decide whether the Secretary used proper standards in allocating the sites available (R. 51–53).

## ARGUMENT

1. The decision of the court below that affirmative relief was beyond its power to grant, was clearly correct. *Work* v. *Rives*, 267 U. S. 175, 177.

Under the statute the opening or closing of fishing areas is highly discretionary.

2. Petitioner's attack upon the regulations does not raise any substantial question. He does not seek to fish in the waters opened by the regulations. As the court of appeals emphasized (R. 48, 49, 50, 53), petitioner seeks by this action, not an equal opportunity to fish in the waters opened by the regulations, but to compel the Secretary of the Interior to open additional Alaskan waters to salmon trapping. He contends (Pet. 11–17) that in refusing to do this the Secretary has violated that provision of Section 1 of the Act of June 6, 1924, 48 U. S. C. sec. 222, which declares that no citizen shall be denied the right to take fish "in any area of the waters of Alaska *where fishing is permitted* by the Secretary" [italics added]. But, petitioner cannot use that clause of the statute to compel the Secretary to open additional areas simply because others—rightly petitioner admits—have occupied the opened areas. The consequence of his interpretation, in the words of the court below, would be that "the number of traps could be limited only by the number of applicants and of available sites, not by the Secretary's judgment concerning the number appropriate for proper conservation. Such a construction would defeat the primary purpose of the Act" (R. 52).

The statute, therefore, does not require the Secretary to open new trapping sites for every

applicant. Where the number of fishermen is too great to occupy the open area, it would seem that no more is required than that the allocation be made on an equitable basis. But, petitioner does not complain of the allocation of opened sites.

3. Since petitioner was not entitled to trap salmon on the sites selected by him, he has no complaint against the Secretary of War for refusing to permit erection of traps on those sites. The practice of the Secretary of issuing but one permit for a trap site is irrelevant.

## CONCLUSION

The decision of the court of appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
*Solicitor General,*
NORMAN M. LITTELL,
*Assistant Attorney General,*
JOHN F. COTTER,
W. ROBERT KOERNER,
ARCHIBALD COX,
*Attorneys.*

FEBRUARY 1942.

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Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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# No. 834

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WILBUR E. DOW,

*Petitioner,*

*vs.*

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HENRY L. STIMSON, SECRETARY OF WAR.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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## PETITION FOR REHEARING.

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WILBUR E. DOW, JR.,
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 834

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WILBUR E. DOW,

*Petitioner,*

*against*

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HENRY L. STIMSON, SECRETARY OF WAR.

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## PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

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*To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

### The Statute.

The statute in question reads as follows: Section 1 of the Act of Congress, June 6, 1924, 42 Stat. 464, as amended June 18, 1926, 44 Stat. 752, reading as follows:

> "Section 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska, the Secretary of Commerce from time to time may set apart and reserve fishing areas in

any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved, the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein, it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.* The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress; Provided, further, that the Secretary of Commerce is hereby authorized to permit the taking of fish or shellfish, for bait purposes only, at any or all seasons in any or all Alaskan Territorial waters. (Italics ours.)

## Point I.

### The Statutory Right of Fishery is Being Denied in Alaska Waters.

The statute states:

> "* * * *nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska* where fishing is permitted by the Secretary of Commerce (Interior)." (Italics ours.)

If this statute means what it says, then it means that any citizen may fish by the same means that any other citizen may use. The Secretary is privileged to *control all fishing equally* and thus regulate the industry in accordance with the statute and in fairness to all who wish to participate in it.

The words of the statute "where fishing is permitted by the Secretary of Commerce" can only mean the general areas that were in existence at the time the Act was passed. It is a prostitution of these words to hold that they mean *a single trap site as granted to an individual or corporation.*

## Point II.

### The Statute is Designed to Prevent the Re-establishment of a Monopoly Enjoyed by a Few Large Fish Operators.

By twisting the terms of the statute which was written as clearly as words could make it, the Secretary has succeeded, unwittingly or otherwise, in re-establishing that monopoly at which the statute was aimed so that the plaintiff herein, or any other American citizen, whether living in Continental United States or Alaska, *is unable to engage in his statutory right of fishery.* The language of the statute is clear. *Either it means what it says or no statute means what it says unless the Secretary says it does.*

POINT III.

**The Secretary Exceeded the Bounds of His Discretion in Interpreting the Statute for Which Relief Should be Granted.**

Every proper delegation of legislative authority contains, or should contain, its own bounds or limitations of discretion. The statute in question specifically says that the Secretary may control fishing by "time, means, methods and extent". It then goes on to say "*that no exclusive or several right of fishery shall be granted therein*" and "*nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska.* * * *".

These limitations constitute the metes and bounds of the Secretary's discretion. If he exceeds it, and he has or the petitioner would not be before this Court, he should be restrained.

**Conclusion.**

The statute specifically gives all citizens the right to fish in the waters of Alaska on equal terms, each with the other. The decision of the Court of Appeals of the District of Columbia, in words which no fisherman has been able to understand, has taken away that right and nullified the statute. To the fisherman, this simply means that the law does not mean what it says.

This Honorable Court is the last appeal to which men may come in a Government of laws and not of people.

WILBUR E. DOW,
By WILBUR E. DOW, JR.,
*Counsel for Petitioner.*

STATE OF NEW YORK,
County of New York, ss:

Wilbur E. Dow, Jr., being duly sworn, according to law, deposes and says:

That he is counsel for the petitioner herein and that the facts set forth in the foregoing Petition are true and correct to the best of his knowledge, information and belief.

WILBUR E. DOW, JR.

Sworn to before me this 12th day of March, 1942.

VIOLA C. OTTAVIANO,
[SEAL.] *Notary Public, Westchester County.*

New York County Clerk's No. 83.
Commission expires March 30, 1943.

I hereby certify that I have examined the foregoing Petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

WILBUR E. DOW, JR.,
*Counsel for Petitioner.*